



# Litigation Update

Litigation Section News

August 2006

## **Only one 170.6 challenge after appellate remand.**

*Code Civ. Proc.* §170.6 permits a party or side to disqualify a judge assigned to hear the matter. Subdivision (a) (3) of the section provides in part that “except as provided in this section, no party . . . shall be permitted to make more than one such motion in any one action or special proceeding.” Subdivision (a) (2) provides such an exception where, after an appeal and remand, the same judge as the one whose judgment was reversed is assigned to, once again, hear the case. But this entitles a party to only one such challenge, regardless of whether a § 170.6 challenge had been exercised in connection with the first trial. *Casden v. Sup.Ct. (Casden)* (Cal. App. Second Dist., Div. 7; June 12, 2006) 140 Cal.App.4th 417, [2006 DJDAR 7349].

## **Judicial immunity under attack.**

The *National Foundation for Judicial Excellence* reports: “On November 7, 2006, the people of South Dakota will vote on a ballot initiative to amend the state’s Constitution. This proposal has been designated the “Judicial Accountability Initiative Law” (J.A.I.L.). If adopted, a South Dakota citizen would be empowered to initiate legal proceedings against a judge when the citizen disagreed with the judge’s decision. The preamble to the J.A.I.L. initiative, in part, states ‘that the doctrine of judicial immunity has the potential of being greatly abused; and when judges do abuse their power, the People are obliged—it is their duty—to correct that injury, for the benefit of themselves and their posterity.’ The organizer and major proponent of the J.A.I.L. amendment is Ronald Branson who resides in southern California.

**Lawyer acting as escrow holder owes duty to both parties.** In *Virtanen v. O’Connell* (Cal. App. Fourth Dist., Div. 3; June 19,

2006) [2006 DJDAR 7729], one party’s lawyer agreed to hold stock in escrow pending negotiations between his client and a seller of the securities. After the seller sought to rescind the sale, the lawyer, presumably on the instructions of his client, closed the escrow and forwarded the stock to the transfer agent for transfer to the client. The seller sued the lawyer-escrow holder. The lawyer claimed that his only obligation was to his client. The court disagreed. By agreeing to become an escrow holder, the lawyer assumed duties to both parties. When a dispute arose between them as to the ownership of the securities, the lawyer should have deposited them into court and filed a complaint in interpleader.

## **For now, Alabama will continue to follow the U.S. Constitution.**

The ABA reported that Four Republican candidates for the Alabama Supreme Court who claimed they could pick and choose which U.S. Supreme Court decisions they would follow—and said they were free to defy the rest—were defeated in the state’s primary election.

## **Class Action Fairness Act also covers “mass actions.”**

The “*Class Action Fairness Act of 2005*” [28 USC §§1332(d)(2), 1332(d)(5), 1453(a)], which expands federal court jurisdiction over larger class actions, does not only apply to traditional class actions but also to “mass actions.” See, *Abrego v. Dow Chemical* (9th Cir., 2006) 44 F.3d 676, for a further discussion of what the court terms the statute’s “muddled ‘mass action’ provisions.”

## **Arbitrator who withdraws may be liable for breach of contract.**

Common law arbitral immunity shields arbitrators from liability for their conduct in quasi-judicial proceedings. But where an arbitrator, after

conducting a hearing, withdrew without justification, he and the arbitration organization that employed him could be liable for breach of contract. *Morgan Phillips Inc. v. JAMS/Endispute* (Cal. App. Second Dist., Div. 4; June 20, 2006) 140 Cal.App.4th 795, [2006 DJDAR 7805].

## **Employment retaliation receives broad interpretation.**

In *Burlington Northern & Santa Fe Railway Co. v. White* (U.S. Supr.Ct.; June 22, 2006) [126 S.Ct. 2405, 165 L.Ed.2d 345, 2006 DJDAR 7866], the U. S. Supreme Court settled conflicting interpretations of retaliatory conduct under Title VII. After *White*, a forklift operator, complained of sexual harassment, she was assigned other duties that were more strenuous.

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But there was no other change in her status. The court rejected a view expressed by some of the Circuit Courts that required a link between the challenged retaliatory action and the terms, conditions, or status of employment. Any employer actions that would have been materially adverse to a reasonable employee may be a basis for a retaliation claim.

### Witness signature appended to will after death of testator does not validate the will.

*Prob. Code* §6110, adopted in 1983, removed the requirement that witnesses to a will sign in the presence of the testator. But, although witnesses are present during the signing of the will, their signature must be appended before the death of the testator to validate the will. *Estate of Saueressig* (Cal.Supr.Ct.; June 22, 2006) 38 Cal.4th 1045, [2006 DJDAR 7911].

### Victim of identity theft came out the winner.

A criminal used Lepe's identity to purchase real property. When the thief defaulted on the trust deed, and the lender foreclosed, the property had increased in value. Who is entitled to the profit? The trial court ordered the excess funds transferred to the county's general fund. The Court of Appeal reversed holding that Lepe had a right to the product of the identity theft. *CTC Real Estate Services v. Lepe* (Cal. App. Second Dist., Div. 5; June 21, 2006) 140 Cal.App.4th 856, [2006 DJDAR 7902].

**School not liable where student killed at school bus stop.** Under *Ed. Code* §44808 a school district is only liable for injuries that occur when a student is on school property (or when the school has otherwise assumed responsibility for the student). In *Bassett v. Lakeside Inn, Inc.* (Cal. App. Third Dist.; June 21, 2006) 140 Cal.App.4th 863, [2006 DJDAR 7904] a student was killed while at a bus stop designated by the school. But because the district did not own the property on which the bus stop was located, it is immune from liability.

**D.A. is not "custodian" of records obtained in a criminal prosecution.** Where civil and criminal actions were pending in a case where defendant drove into a crowd, plaintiff's lawyer in the civil case served a subpoena on the district attorney to obtain documents produced by defendant in connection with the criminal trial. When the district attorney objected to the subpoena, the trial court ordered the documents be produced. The Court of Appeal granted the D.A.'s petition for a writ of prohibition. Because the D.A. cannot authenticate the records under *Evid. Code* §1561 (a) (4) and (5), it is not the "custodian" under that statute. *Cooley v. Sup.Ct. (Greenstein)* (Cal. App. Second Dist., Div. 1; June 26, 2006) 140 Cal.App.4th 1039, [2006 DJDAR 8173].

**No relation back of amended complaint unless same injury is asserted.** In an action for wrongful death, decedent's survivors sued the nursing facility where decedent had died. Later they amended their complaint to add a cause of action under the *Elder Abuse Act*. (*Welf. & Inst. Code* §15657). A wrongful death action compensates the heirs for their own loss. A cause of action under the Elder Abuse Act is for injuries to victims of elder abuse which survive their death. Thus, the first cause of action was for injuries sustained by the heirs; the second cause of action for injuries sustained by the decedent. Because different injuries were asserted in the amended complaint, it did not relate back and was therefore barred by the one-year statute of limitations for claims under the *Elder Abuse Act*. *Quiroz v. Seventh Avenue Center* (Cal. App. Sixth Dist.; June 27, 2006) 140 Cal.App.4th 1256, [2006 DJDAR 8248].

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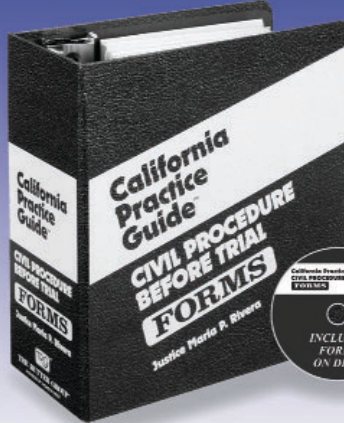
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